APPENDIX C

FILED JULY 15, 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DON SOON PARK, Petitioner, v. DON R. HILL (WARDEN) AND ATTORNEY GENERAL OF THE STATE OF CALIFORNIA DANIEL E. LUNGREN Respondents.	No. CV 96-2841-JMI(JR) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON STATE PRISONER'S PETITION FOR WRIT OF HABEAS CORPUS

The Magistrate Judge to whom this matter is assigned submits this Report and Recommendation to the Honorable James M. Ideman, United States District Judge, pursuant to 28 U.S.C. § 636(b)(1)(B) and General Order 194 for the Central District of California.

BACKGROUND

Viewing the facts most favorably to the prosecution, as this court must in this habeas corpus proceedings, Jackson v. Virginia, 433 U.S. 307, 326, 99 S.Ct. 2781, 2793, reh. denied, 444 U.S. 890, 100 S.Ct. 195 (1979), the record discloses the following[1]:

In March and April 1991, Petitioner Don Soon Park ("Park") hired Messrs. Nelson and Sander as security guards in one of his nightclubs. Numho Kim owed Park money. Park told Nelson about a plan to: follow Kim home at night, restrain him with duct tape, threaten him with a gun, and rob him of the money. Park recruited Nelson and Sander into a conspiracy to commit the robbery. Between May and August 1991, Park, Nelson and Sander unsuccessfully tried twice to carry out their plans. On August 20, 1991, Park Nelson, and Sander went, as planned, near Kim's house at about midnight. Kim arrived home. Sander and Nelson followed Kim into the garage, where Sander began hitting Kim. Kim's wife entered the garage and screamed. Sander and Nelson left. Park, who drove separately, escaped. The police stopped and arrested Nelson and Sander.

The evidence concerning the threats and bombing established that Park had known Mr. and Mrs. Soo Young Hong, their children, and Mr. Soo's mother for some time. Mr. Soo owed Park money. Park was dating Mrs. Soo during her separation from Mr. Soo. Sometime prior to May 11, 1992, Park and Mrs. Soo asked Nelson to kill Mr. Soo. Nelson refused. Park then told Nelson he

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1. The facts set forth in this opinion rely on the California Court of Appeal's summary. [See Return To Petition For Writ Of Habeas Corpus And Memorandum Of Points And Authorities In Support Thereof, filed May 23, 1996 (Ret."), Exh. B, pp. B40-B42.]

was going to "blow up" Mrs. Soo's house, Mr. Soo's mother's house, and Mr. Soo's store. Sometime before the store was bombed, Park had a disagreement over a remark with Mr. Soo's mother. Park blamed Mr. Soo's mother for the remark and repeatedly demanded monetary compensation from her. A few days before the store bombing, Park telephoned Mr. Soo's mother and told her if she did not pay he would not leave her family alone, bomb her store, and kill her and her family. Mr. Soo's mother took Park's threats seriously and notified the police. On June 8, 1992, a galvanized pipe bomb blew up the store.

On March 26, 1993, the District Attorney filed a four count information in case No. BA067141 concerning the incident at Mr. Kim's house, charging Park with conspiracy to commit robbery Cal. Pen. Code §§ 182(a)(1), 211 (Count 1)[2], conspiracy to commit burglary Cal. Pen. Code §§ 182(a)(1), 459 (Count 2), first degree residential burglary Cal. Pen. Code § 459 (Count 3), and attempted first degree residential burglary. Cal. Pen. Code §§ 211, 664 (Count 4). On July 28, 1993, the prosecutor filed an amended information in Case No. BA059736 regarding the threats and store bombing against the Soos and alleging that Park made terrorist threats, Cal. Pen. Code § 422, (Count 5), used a destructive device and explosive to injure or destroy property, Cal. Pen. Code § 12303.4 (Count 6), and arson of a structure. Cal. Pen. Code §451(c) (Count 7).

On April 8, 1993, the prosecutor filed a motion to consolidate case number BA067141 with number

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2. Even though the prosecution initially filed two separate cases, for sake of simplicity, all numbered counts here refer to the counts as they were numbered in the consolidated action in which the jury convicted Park.

BA059736 because both cases charged assaultive behavior, the evidence was cross-admissible, and the consolidation would result in the efficient use of court time. Following a hearing, the court ordered the two cases consolidated. The court found:

> "[T]he issues in case No. BA067141 [counts 5-7] are similar to the issues and charges in this action [counts 1-4 in case No. BA059736]. The court hereby consolidates said cases over the defense objection . . .."

[See Ret., Exh. B, p. B42.] The trial court consolidated the complaints into a single case of seven counts.

In proving its case at trial, the prosecution relied heavily on the testimony of Nelson and played for the jury a secret tape recording Nelson made of a confession Park made while the two of them were in jail together. In his defense, Park presented character witnesses, including Mr. Soo's wife, who said he was not capable of committing any of the crimes.

The jury convicted of Counts 1-5 and acquitted him of Counts 6 and 7. Further, the jury found to be true the special allegations that Park was a principal who was armed with a firearm in count 1-4. Cal. Pen. Code § 12022(a)(1).

After the jury convicted him, Park appealed, raising in the Court of Appeal the arguments that the trial court improperly joined Counts 1-4 (Case No. BA059736) with Counts 5-7 (Case No. BA067141 and that the joinder prejudiced Park. The Court of Appeal affirmed the conviction. [Ret., Exhs. A-B.] Park raised the same contentions in a Petition for Review before the California Supreme Court, which the Court denied without citation

to authority. [Ret., Exh. C; Am. Exh. C to Ret., filed May 31, 1996.]

Park later raised three contentions on Writ of Habeas Corpus in the California Supreme Court: 1) the prosecutor committed misconduct by failing to disclose that Nelson was a government informant; 2) the trial court abused its discretion in allowing jury to hear a secret tape recording; and 3) the prosecutor's delay in bringing charges against Park denied Park his due process right to speedy trial and right to effective assistance of counsel. The Court denied the petition, citing In re Dixon, 41 Cal.2d 756, 759, 264, P.2d 513 (1953). [Ret., Exh. D.]

DISCUSSION

Here, Park raises five contentions:

1. The trial court erred when it consolidated Counts 1-4 (Case No. BA059736) and 5-7 the two cases against Park, and BA067141. [Petition For Writ Of Habeas Corpus By A Person In State Custody, filed Apr. 22, 1996 ("Pet."), pp. 5 & foll. at 1-17.]

2. The prosecutor committed misconduct by failing to disclose before the jury that prosecution witness Michael Nelson was a government informant. [Pet., pp. 5 & foll at 8-13.]

3. The trial court abused its discretion by permitting the jury to hear a secret jailhouse tape Nelson made. [Pet., pp. 6 & foll. at 14.]

4. The trial court denied Park his right to a speedy trial. [Pet., pp. 6 & foll. at 15-17.]

5. Park's trial counsel was ineffective. [Ret. p. 4, citing Pet., pp. 19, 21-23.]

The state argues that Park has procedurally defaulted on claims two through five [Ret., pp. 5-10], and that claim one "is not a cognizable federal habeas claim." [Ret., pp. 11-12.]

A. Contention One

Park says the trial court "erred" when it consolidated the two cases against him, Case Nos. BA059736 and BA067141, thereby joining the charges under Counts 1 through 4 with Counts 5 through 7. [Pet., p. 5.][3]

In Featherstone v. Estelle, 948 F.2d 1497 (9th Cir. 1991), the Ninth Circuit articulated the "test [the court] appl[ies] in evaluating petitioner's claim of Constitutionally impermissible joinder:"

> "'[t]he propriety of consolidation rests within the sound discretion of the state trial judge. The simultaneous trial of more then one offense must actually render petitioner's state trial fundamentally unfair and hence, violative of due process before relief pursuant to 28 U.S.C. § 2254 would be appropriate.'"

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3. As to the first claim, the State concedes that Park has exhausted his state court remedies and does not contend that he has procedurally defaulted. [Ret., p. 3.] Therefore, the Court proceeds to the merits. Francis v. Rison, 894 F.2d 353, 355 (9th Cir. 1990) (failure to raise procedural default in district court is a waiver); Karis v. Vasquez, 828 F.Supp. 1449, 1463n.21 (E.D. Cal. 1993) (state bears burden of proof on procedural default defense); see also 28 U.S.C. § 2254(b)(3) (as amended by Terrorism Prevention Act, Pub.L. No. 104-132 § 104, 1110 Stat. 1214 (1996)).

948 F.2d at 1503, quoting Tribitt v. Wainwright, 540 F.2d 840, 841 (5th Cir. 1976), cert. denied, 430 F.2d 910, 97 S.Ct. 1184 (1977).[4]

Furthermore, in considering whether a violation of due process has occurred, the emphasis must be on the word "actually"; for viewed clearly, it is only the consequences of joinder, over which the trial judge has much control, and not the joinder itself, which may render the trial "fundamentally unfair." See United States ex. rel. Evans v. Follette, 364 F.2d 305, 306 (2d Cir. 1996) (per curiam), cert. denied, 385 U.S. 1016, 87 S.Ct. 733 (1967) (decision to consolidate charges for trial does not itself raise an issue of constitutional dimension).[5] Therefore,

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4. See also United States v. Lane, 474 U.S. 438, 446, n.8, 106 S.Ct. 725, 730 n.8, reh. denied, 475 U.S. 1104, 106 S.Ct. 1507 (1986) ("Improper joinder does not, in itself, violate the Constitution"; "[r]ather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial"); Herring v. Meachum, 11 F.3d 374, 377-78 (2nd Cir. 1993), cert. denied, __ U.S. __, 114 S.Ct. 1629 (1994) ("Joinder of offenses rises to the level of a constitutional violation only if it actually render[s] petitioner's state trial fundamentally unfair and hence, violative of due process'") (citation omitted); Leach v. Kolb, 911 F.2d 1249, 1258 (7th Cir.), cert. denied sub nom. Leach v. McCaughtry, 498 U.S. 972, 111 S.Ct. 441 (1990) ("the standard for the district court under § 2254 is that an improper joinder constitutes a federal constitutional violation only if the prejudice was so great as to deny a fair trial").

Park contends the joinder violates California Penal Code Section 954. [Pet., foll. p. 5, at 1-3.] Since it does not involve assertion of a federal right, this argument is not cognizable in this court.

5. "There is indeed always a danger when several crimes are tried together, that the jury may use the evidence cumulatively; that is, that, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all." United States v. Lotsch, 102

when a petitioner is claiming a due process violation based upon joinder of offenses, he must, to succeed, go beyond the potential for prejudice and prove that actual prejudice resulted from the events as they unfolded during the joint trial. Tribitt, 540 F.2d at 841 (joinder must "actually" render trial fundamentally unfair before habeas relief is appropriate).

Park argues that the consolidation in this case "prejudiced" him (Pet., foll. p. 5 at 3] because (1) the evidence in each case would not be cross-admissible from one to the other if the court tried them separately [Pet., foll. p. 5, at 5-6], (2) the charges were "likely to inflame the jury," and (3) the case involved the "improper

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F.2d 35, 36 (2d Cir.) (L. Hand, J.) cert. denied, 307 U.S. 622, 59 S.Ct. 793, 83 L.Ed. 1500 (1939). "'[J]uries are apt to regard with a more jaundiced eye a person charged with two crimes that a person charged with one.'" United States v. Werner, 620 F.2d 922, 929 (2d Cri. 1980)) quoting United States v. Smith, 112 F.2d 83, 85 2d Cir. 1940)); see also Corbett v. Bordenkircher, 615 F.2d 722, 724-25 (6th Cir.), cert. denied, 449 U.S. 853, 101 S.Ct. 146 (1980) (describing forms of prejudice that may result from joint trial.)

Nonetheless, the Supreme Court, a generation ago, explicitly accepted that "[t]his type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that (1) the jury is expected to follow instructions in limiting the evidence to its proper function, and (2) the convenience of trying different crimes against the same person . . . in the same trial is a valid governmental interest." Spencer v. Texas, 385 U.S. 554, 562, 87 S. Ct. 648, 653, reh. denied, 386 U.S. 969, 87 S. CT. 1015 (1967). Thus, joinder of offenses has long been recognized as a constitutionally acceptable accommodation of the defendant's right to a fair trial. As discussed in the context of joinder of defendants, consolidated prosecutions "conserve state funds, diminish inconvenience to witnesses and public authorities and avoid delays in bringing those accused of crime to trial." Burton v. United States, 391 U.S. 123, 134, 88 S.Ct. 1620, 1627 (1968); see also Zafiro v. United States, 506 534, 537, 113 S.Ct. 933, 937 (1993).

'spillover' effect of aggregate evidence" from one set of charges to the other. [Pet., foll. p. 5 at 6-7.]

Cross-admission of the evidence as to counts 1 through 7 in separate trials would not have violated due process. The evidence as to the "Munho Kim" crimes (Counts 1 through 4) essentially consisted of Nelson's testimony and its admission in a trial concerning the "Keum Kim" crimes (counts 5 through 7) would not have violated due process. Nelson was Park's friend and confident from December of 1990 until May 11, 1992. Between March of 1991 until at least August 20, 1991, Nelson worked at Park's nightclub seven days a week and dined with Park almost nightly, and Park discussed his criminal schemes and ambitions with Nelson. Sometime, prior to May 11, 1992, less than four weeks before the "Keum Kim" crimes occurred, Park told Nelson he was going to "blow up" Soo's house (Keum's house) and a business Soo's family owned and operated. Prior to May 11, 1992, Park frequently told Nelson he had access to explosives whenever he desired. (R.T. 537-540, 543-546, 548-552, 1028-1029, 1032-1036.] Nelson's testimony could have established appellant's opportunity, intent, knowledge, absence of mistake or accident as to the "Keum Kim" crimes in a separate trial on counts 5 through 7. See, e.g. Cal. Evid. Code § 1101(b) ("[n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as . . . opportunity, intent. . . . knowledge, identity, absence of mistake or accident . . . .) other than his or her disposition to commit such an act").

This is not a case where certain of the charges were unusually likely to have actually inflamed the jury against Park. The jury did not find Park guilty of charges 6 and 7. Therefore, it can be inferred that the jury was not

tainted by the consolidation of the counts, since had it been inflamed, the jury presumably would have found Kim guilty of all counts.

Third, the record shows Park's conviction on the "Munho Kim" crimes (Counts 1 through 4) rested almost exclusively on the jury finding Nelson's testimony credible. Likewise, Park's conviction on the terrorist threats count (Count 5) rested almost exclusively on the jury finding Keum's testimony credible. Hence, this is not a case where a weak case has joined with a strong case (or another weak case) so that the spillover effect of aggregate evidence charges altered the outcome of some or all of the charges. As noted earlier, the jury found Park not guilty of Counts 6 and 7.

Indeed, that the jury found Park not guilty on counts 6 and 7 affirmatively demonstrates appellant suffered no actual prejudice by the consolidation of Counts 1 through 7 and that his claim of improper consolidation therefore fails.

B. Claims Two Through Five

The California Supreme Court's citation of In re Dixon, 41 Cal.2d 756, 759, 264 P.2d 513 (1953) makes it clear the Court relied on procedural bar to deny review of the claims Park asserted in his state habeas petition. "The independent and adequate state ground doctrine prevents the federal courts from addressing the habeas corpus claims of state petitioners when a state-law default prevented the state courts from reaching the merits of the federal claims." Thomas v. Lewis, 945 F.2d 1119, 1122 (9th Cir. 1991). Park has therefore procedurally defaulted on claims two through five of his present petition.

This court may address the merits of Park's procedurally defaulted claims if Park can show cause for the procedural default and actual prejudice as a result of the alleged violations of federal law. Bonin v. Calderon, 77 F.3d 1155, 1158 (9th Cir.), cert. denied, ___ U.S. ___, 116 S.Ct. 980 (1996). To demonstrate cause, Park must show the existence of "some objective factor external to the defense [which] impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). Lacking cause and prejudice, the court may nonetheless consider procedurally barred claims if failure to consider then would result in the conviction of "'one who is actually innocent.'" Schlup v. Delo, ___ U.S. ___, _, 115 S.Ct. 851, 864 (1995).

Park claims he can show cause because the procedural default was "due to . . . Appellate Counsel rendering petitioner ineffective assistance of counsel." [Notice of Traverse To The Attorney General[']s Return And Memorandum Of Points And Authorities In Support Thereof, filed Jun. 10, 1996 ("Tr."), p. 1.] He also asserts that prejudice resulted from his appellate attorney's failure to raise contentions two through five and that this failure resulted Park's conviction for crimes of which he is actually innocent. [Tr., pp. 2-4.] "Ineffective assistance of counsel may constitute case, if the representation amounts to an independent Sixth Amendment violation." Moran v. McDaniel, 80 F.3d 1261, 1271 (9th Cir. 1996); see also Bonin v. Vasquez, 999 F.2d 425, 428 (9th Cir. 1993).

However, Park's mere statement that his attorney should have raised the issues does not suffice, and a claim of ineffective assistance of counsel must first be separately exhausted in state court before it can serve as cause for the procedural default of another claim. Murray v. Carrier, 477 U.S. 478, 488-89, 106 S.Ct. 2639, 2645-46

(1986). Since Park has not fairly presented this claim to the California Supreme Court, "we may not now entertain the claim as 'cause' for default." Tacho v. Martinez, 862 F.2d 1376, 1381 (9th Cir. 1988); Hughes v. Idaho State Board Of Corrections, 800 F.2d 905, 906 (9th Cir. 1986).[6]

Alternatively, Park argues that failure to reach the merits of his claims would result in a fundamental miscarriage of justice. [Tr., p. 3.] There is no serious question of Park's guilt, nor does he even press this issue diligently. See Bonin v. Calderon, 59 F.3d 815, 836 (9th Cir. 1995), cert. denied, ___ U.S.___, 116 S.Ct. 718, reh. denied, ____ U.S. ____, 116 S.Ct. 977 (1996) (applying prejudice standard for cases in which there is "'overwhelming evidence of guilt,'" quoting United States v. Coleman, 707 F.2d 374, 378 (9th Cir.), cert. denied, 464 U.S. 854, 104 S.Ct. 171 (1983)). No fundamental miscarriage of justice would occur from denying Park's petition as procedurally barred.

CONCLUSION

Accordingly, IT IS THERE RECOMMENDED that the Court DENY Park's petition for writ of habeas corpus with prejudice.

DATED: This _____ day of July, 1996

Joseph Reichmann
United States Magistrate Judge

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6. Park also argues that the long delay in the prosecution filing charges against him is also cause. [Tr., p. 4.] However, Park has not shown how the delay in his trial in any way prevented him from raising his claims on direct appeal. Hence, it cannot constitute cause for that failure.

FILED
SEPTEMBER 20, 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DON SOON PARK,	)	No. CV 962841-JMI(JR)
	)	
Petitioner,	)	FINAL REPORT
	)	AND
	)	RECOMMENDATION
v.	)	
	)	
DON R. HILL, WARDEN, et al.,	)	
	)	
Respondent.	)	

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable James M. Ideman, United States District Judge pursuant to the provisions of 28 U.S.C. Section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On July 15, 1996 the Clerk filed a Notice of Filing of Magistrate Judge's Report and Recommendation and Lodging of Proposed Judgment, which was served on the parties, together with copies of the Magistrate Judge's Report and Recommendation.

No objections were filed.

IT IS THEREFORE RECOMMENDED that this Court issue an Order approving and adopting the Report and Recommendation and dismissing the petition.

DATED: August 8, 1996.

/S/
JOSEPH REICHMANN
United States Magistrate Judge

LODGED
JULY 15, 1996

FILED
SEPTEMBER 20, 1996

ENTERED
SEPTEMBER 23, 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DON SOON PARK,	)	No. CV 96-2841 JMI(JR)
	)	
Petitioner,	)	JUDGMENT
	)	
v.	)	
	)	
DON R. HILL, WARDEN, and ATTORNEY GENERAL et al.	)	
	)	
Respondents.	)	

IT IS ADJUDGED that the petition of Don Soon Park for writ of habeas corpus is dismissed with prejudice.

DATED: 19 Sep. 96

/S/
Hon. James M. Ideman
United States District Judge

FILED
SEP 20 1996

ENTERED
SEP 23 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DON SOON PARK,	)	No. CV 96-2841-JMI(JR)
	)	
Petitioner,	)	ORDER
	)	ADOPTING THE
v.	)	MAGISTRATE JUDGE'S
	)	FINDINGS,
DON R. HILL,	)	CONCLUSIONS AND
Warden,	)	RECOMMENDATIONS
et al.	)	
	)	
Respondent.	)	

Pursuant to 28 U.S.C. Section 636(b)(1)(B), the Court has reviewed the pleadings and all papers herein, the Report and Recommendation, and adopts the findings, conclusions and recommendations of the United States Magistrate Judge.

IT IS ORDERED that Judgment be entered dismissing the petition.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order by United States mail on the petitioner and respondent.

DATED: 19 Sep 96

/S/
JAMES M. IDEMAN
United States District Judge

FILED
NOV 22 1996

ENTERED NOV 26 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DON SOON PARK,	)	No. CV 96-2841-JMI(AN)
	)	
Petitioner,	)	ORDER
	)	DENYING MOTION
v.	)	FOR CERTIFICATE OF
	)	PROBABLE CAUSE
DON R. HILL,	)	
WARDEN,	)	
et al.	)	
	)	
Respondents.	)	

On September 23, 1996, judgment was entered dismissing petitioner's petition for writ of habeas corpus with prejudice. Petitioner filed a Notice of Appeal on October 1, 1996, along with a document entitled "Notice of Motion and Motion for Certificate of Probable Cause" ("Motion").

On April 24, 1996, the President signed into law the "Antiterrorism and Effective Death Penalty Act," ("the Act"). The Act, in part, amends 28 U.S.C. §2253, the provision governing the appealability of a district court's decision on habeas petitions filed by a state prisoner. Pub.L.No. 104-132. While petitioner's habeas petition was filed before the enactment of the Act, judgment was

entered, and his Notice of Appeal and Motion were filed, after the Act had been signed into law.

The Court concludes the amended section 2253(c) applies to petitioner's case. See Reyes v. Keane, 90 F.3d 676, 680 (2d Cir. 1996) (holding that amended section 2253(c) applied to an application for a certificate of probable cause filed after the effective date of the Act, even through the habeas petition had been denied before the Act, because the provision amounted to a procedural change that posed no issue of retroactivity); Lennox v. Evans, 87 F.3d 431, 434 (10th Cir. 1996) (holding amended section 253(c) applied to an application for a certificate of probable cause filed before the effective date of the Act); United States v. Cota-Loaiza, ___ F.Supp. _ 1996 WL 465209, at *2 (D.Colo. 1996) (holding amended section 2253(c) applied to an application for a certificate of probable cause filed after the effective date of the Act); Parker v. Norris, 929 F.Supp. 1190, 1191 n.1 (E.D.Ark. 1996) (same); Houchin v. Zavaras, 924 F. Supp. 115, 116-117 (D.Colo. 1996) (same); cf. Lowell v. Prunty, 91 F.3d 1358, 1359 (9th Cir. 1996) (declining to decide whether amended section 2253(c) applied to cases pending before the effective date of the Act); Williams v. Calderon, 83 F.3d 281, 286 (9th Cir. 1996) (same).

Under section 2253(c), as amended, a request for a certificate of probable cause is now called a certificate of appealability and will only be granted if the petitioner has made a "substantial showing of the denial of a constitutional right." 29 U.S.C. §2253(c)(2). The Ninth Circuit has recently held "the standard of obtaining a certificate of appealability under the Act is more demanding than the standard for obtaining a certificate of probable cause under the law as it existed prior to enactment of the Act." Williams v. Calderon, 83 F.3d at

286. But See Reyes v. Keane, 90 F.3d at 680 (standards under both terms are the same).

In any event, the Court has reviewed the petitioner's Notice of Appeal, his Motion (which is construed as a request for a certificate of appealability instead of request for a certificate of probable cause), and the final Report and Recommendation of the United States Magistrate Judge previously adopted by the Court and filed on September 23, 1996. Based on the foregoing, the Court finds the petitioner has failed to make the requisite showing required for the issuance of a certificate of probable cause, let alone a certificate of appealability. Accordingly, petitioner's Motion is denied.[1] **It is so ordered.**

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1. The amended statute provides that an appeal may not be taken to the court of appeals from a district judge's ruling on a state prisoner's habeas corpus petition unless a "circuit justice or judge" issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). Read alone, section 2253(c) appears to eliminate this Court's authority to rule on petitioner's motion. The Act, however, also amends Rule 22 of the Federal Rules of Appellate Procedure. In relevant part, amended Rule 22 provides that "an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to 28 U.S.C. § 2253(c)."

While it is not entirely free from doubt, the weight of the authority indicates that this Court retains the authority to issue certificates of appealability under the Act. See Haykins v. Roberts, __ F.Supp. ___ 1996 WL 478799, at *1 (S.D. Miss. 1996); United States v. Cota-Loaiza, 1996 WL 465209, at *4; Houchin v. Zavaras, 924 F.Supp. 115, 117 (D.Colo. 1996); but see Parker v. Norris, 929 F. Supp. At 1192-93 (concluding that a district court lacks authority to issue a certificate of appealability under the Act). The Court need not reconcile 2253(c) with Rule 22 because, whether the Court has authority to issue the certificate or not, the outcome in petitioner's case is the same -- that is, the denial of his appealability after concluding district court lacked authority to rule on motion). Petitioner may seek a certificate of appealability by filing a request for such certificate in the United States Court of Appeals for the

DATED: November 20, 1996

/S/
JAMES M. IDEMAN
UNITED STATES DISTRICT JUDGE

Ninth Circuit in accordance with 28 U.S.C. §2253.

FILED
MAR 14 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DON SOON PARK,	) No. 96-56750
	)
Petitioner/Appellant,	) DC# CV-96-2841
	) -JMI
	) Central California
vs.	)
	) ORDER
PEOPLE OF THE STATE OF CALIFORNIA, et al.,	)
	)
	)
Respondents/Appellees.	)

Before: LEAVY and THOMAS, Circuit Judges

Appellant is granted a certificate of probable cause. Appellant's request for a certificate of appealability is denied as unnecessary because appellant's petition was filed in the district court prior to the effective date of the Antiterrorism and Effective Death Penalty Act of 1996. See Jeffries v. Wood, 103 F.3d 827 (9th Cir. 1996) (en banc) (order).

Appellant is granted leave to proceed in forma pauperis.

Appellant's opening brief is due April 25, 1997; appellee's brief is due May 27, 1997; the optional reply brief is due within 14 days after service of appellee's brief.

Because appellant is a prisoner proceeding in forma pauperis and is not represented by counsel appellant is not required to file excerpts of record. 9th Cir. R. 24-1.

Because there were no hearings in the district court, the clerk of that court shall forward the Certificate of Record immediately. 9th Cir. R. 11-2.

The Clerk shall retain the district court case file as the record on appeal pending resolution of this appeal.

mocal/3.11.97/sc